BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

Appellant,	)	
v.	)	**DOCKET NO. 00-12-230**
DELAWARE DEPARTMENT OF TRANSPORTATION,	)	**DECISION AND ORDER**
Agency.	)	

COPY

PUBLIC ORDER (29 *Del. C.* §5948)

BEFORE Dallas Green, John F. Schmutz, Esquire, and John W. Pitts, members of the Merit Employee Relations Board ("Board"), constituting a quorum of the Board pursuant to the provisions of 29 *Del. C.* §5908(a).

APPEARANCES:

For the Agency:
Ilona Kirshon, Esquire
Deputy Attorney General
Department of Justice
820 N. French Street -6th floor
Wilmington, DE 19801

For the Appellant:
The Appellant appeared *pro se*

NATURE AND STAGE OF THE PROCEEDINGS

This matter comes before the Board as an appeal from the disciplinary dismissal of Appellant on September 19, 2000 from her position in the Classified Service with the Department of Transportation ("the Department"). The appeal to the Board was timely filed by legal counsel for the Appellant on December 15, 2000 and the evidentiary hearing was conducted by a quorum of the Board on March 21, 2001. The Appellant was not represented by legal counsel at the hearing and, after being advised of her right to have legal counsel present, determined to proceed

pro se. Appellant elected to have a non-public hearing concerning her grievance appeal and the Board will issue both a public and a non-public decision and order based upon the evidence presented at the hearing. This is the public decision and order which does not identify the Appellant.

SUMMARY OF EVIDENCE

A verbatim transcript of the hearing proceedings was taken by a stenographic reporter. The following is a brief summary of the evidence presented at the non-public hearing on March 21, 2000.

Mark Galipo, being sworn, testified that he is a traffic systems design technician employed by the Department. On August 8, 2000, he was standing by the printer in his office at approximately 10:00 a.m. when he saw the Appellant walk to her car in the parking lot, open the rear passenger side door, and enter her car. He noted the occurrence to John Gosch, who also worked in the same traffic section office, and wondered what Appellant was doing. Mr. Galipo next saw the Appellant when she got out of her car at 11:05 a.m. He testified that there were three people who witnessed Appellant getting out of her car and noted that it was memorable because the outside temperature was approximately 95 degrees. On cross examination Mr. Galipo stated that it was an unusual occurrence to have someone go lay down in a car when it was that hot. It did not cross his mind that the Appellant might have been ill, rather he thought she was just sleeping in her car.

Lewis J. Gosch, III, in sworn testimony, recounted that he works in the traffic section for the Department and on August 8, 2000 he observed the Appellant enter the back of her car at approximately 10:00 a.m. At approximately 10:30 a.m. Mr. Gosch went to get a drink of water.

He stopped at the desk of Ms. Stuckman who shares the office with the Appellant and asked her if she knew the Appellant was outside in her car. Ms. Stuckman responded that she did not know where the Appellant was located. According to Mr. Gosch, Ms. Peters, the Appellant's supervisor, was standing in the hall and overheard the conversation between Mr. Gosch and Ms. Stuckman and indicated she would look into the matter. On cross examination, Mr. Gosch observed that he did not feel it was his place to go out to the car to check on the Appellant.

Donna Stuckman, being sworn, testified that on August 8, 2000 she was sharing office space with the Appellant because the Appellant had been recently transferred to Dover from the Traffic Management Center Office in New Castle County. According to Ms. Stuckman, the Department policy allows a 15 minute break and she took her break on August 8, 2000 at 9:30. She did not see the Appellant leave but when she returned at 9:45 from her break, the Appellant was not in the office. At approximately 10:30 a.m., John Gosch told her that the Appellant was outside sleeping in her car. Later, the Appellant returned to the office, did not seem ill, and did not say anything about taking a nap in her car. On cross-examination, Ms. Stuckman acknowledged that the Appellant had complained to her about people speaking in a high pitched, loud voice because of Appellant's hearing difficulties. Ms. Stuckman acknowledged that she and the Appellant had worked out an arrangement where they could communicate in a normal voice and avoid loud, high pitched conversations.

Fred Hengst, in sworn testimony, stated that he was the Application Support Project Leader and the Appellant had been employed as a Senior Application Support Specialist with the Department. He had been the Appellant's supervisor since November 1991. The Appellant had worked in several Department offices and, in August 2000, she was assigned to the Dover office

because, according to Mr. Hengst, the chief engineer determined that she was not producing enough work and felt she could receive greater supervision in the Dover location. On the afternoon of August 8, 2000, Mr. Hengst received an e-mail from the Appellant's immediate supervisor notifying him that the Appellant had been reported for sleeping in her car. Mr. Hengst investigated the incident the next day and, as a part of his investigation, spoke to the Appellant who acknowledged that she felt tired and had needed a break. Mr. Hengst testified that the Department allowed two breaks of 15 minutes duration during the day. Upon completing his investigation, Fred Hengst spoke with Nancy DeStephano in the Department's Personnel Section about the incident, and, after reviewing the Appellant's prior record, concluded that termination of Appellant's employment was appropriate.

Mr. Hengst identified State's Exhibit No. 1 as a copy of the written memorandum dated August 15, 2000 by which he informed the Appellant that he was recommending her for termination for unauthorized absence from work on August 8, 2000 from 10:00 a.m. to 11:05 a.m. The proposed termination was based upon the Appellant having been continually counseled, warned, and having received suspensions ranging from 5 days to 30 days for very similar infractions without correcting the inappropriate behavior.

Mr. Hengst identified State's Exhibit No. 3 as a memorandum which he delivered to the Appellant on February 15, 1999 recommending a 15 day suspension for the Appellant having reported to work late or not at all on fifteen separate occasions between August 25, 1998 and January 22, 1999.

Mr. Hengst also identified State's Exhibit No. 4 as a memorandum he prepared and delivered to the Appellant recommending a 15 day suspension of the Appellant because of her

actions in connection with a computer class on February 17, 1999 and February 22, 1999. The Appellant had arrived late and did not participate in the class, rather she "surfed the net" and put her head on the desk and assumed the position of sleep.

Mr. Hengst identified State's Exhibit No. 5 as an agreement the Department reached with the Appellant resolving the Appellant's grievances of the two 15 day suspensions proposed in State's Exhibit No. 3 and State's Exhibit No.4. The agreement resulted in the reduction of the second 15 day suspension to a 4 day suspension without pay and an 11 day suspension with pay.

State's Exhibit No. 6 was identified by Fred Hengst as a copy of the written reprimand which he gave to the Appellant on March 7, 2000 for her repeated failure to fill out her work log. State's Exhibit No. 7 was identified by Mr. Hengst as a copy of the written reprimand for tardiness he gave to the Appellant on August 25, 1999.

Witness Hengst identified State's Exhibit No. 8 as a written warning memorandum written by Resa Moghissi, Chief Traffic Engineer, to the Appellant on March 20, 2000 recounting that on March 8, 2000, Appellant had been relocated to the Sign Shop Facility and, out of the nine working days since that reassignment, the Appellant had been late a total of five days and had taken leave on two days. The memorandum (State's Exhibit No. 8) noted that any future occurrences of not arriving to work on time might result in a written reprimand, suspension without pay, and/or termination.

Mr. Hengst identified State's Exhibit No. 9 as a memorandum which he wrote and delivered to the Appellant expressing concern with the pattern of sick leave usage between April 15, 1999 and April 15, 2000 during which the Appellant had used over 30 days of sick leave. The memorandum required her to justify further sick leave with medical certification.

State's Exhibit No. 10 was identified as a memorandum from Fred T. Hengst to the Appellant dated April 27, 2000 recommending the imposition of a 30 day suspension as a result of continuing tardiness and failure to report resulting in unauthorized leaves of absences. The memorandum specified five dates when the Appellant was late for work for periods ranging from 1.25 hours to 4.0 hours and ten dates from April 6, 2000 through April 26, 2000 when Appellant did not report for work at all.

Fred Hengst identified State's Exhibit No. 11 as a copy of the letter sent to the Appellant after her pre-termination hearing held on September 13, 2000 recommending to the Secretary of the Department that the termination of employment recommendation be upheld. The letter noted that the Appellant admitted accidentally falling asleep in her car and being absent from work between 10:00 a.m. and 11:05 a.m. on August 8, 2000. State's Exhibit No. 12 was identified by the witness as a copy of the termination letter to the Appellant from the Department Secretary.

The Department introduced a copy of the decision of the Merit Employee Relations Board in Docket No. 98-12-136 upholding the imposition of a 5 day disciplinary suspension of the Appellant for apparently sleeping on duty.

Fred Hengst testified that the Appellant had never produced any medical support for her hearing deficit and had only asked that people not speak to her in a high pitched loud voice.

On cross examination by the Appellant, Mr. Hengst recalled that the Appellant had been told that it was acceptable for her to sleep in her car or in the break room so there would be no misunderstanding that she was sleeping while she was supposed to be working. Mr. Hengst acknowledged that what the Appellant did on her break time was her business and she could sleep then in her car if she wished to do so. Mr. Hengst also acknowledged that employees were often

accorded leave time to take care of unexpected situations and, that at the time of the August incident, the Appellant had sufficient leave to cover the period of approximately 45 minutes the Appellant had fallen asleep in her car beyond the allowed 15 minute break time. Mr. Hengst also noted that the Appellant had, in his opinion, mild hearing difficulties which did not cause a problem while she was talking on the telephone.

The Appellant, after being sworn, testified that she had gone to sleep in her car during her break and had accidentally slept longer than her allotted break time. She stated that it was not an intentional act but rather that she was tired because of having to drive from her home in New Castle County to the Dover work location. She stated that her hearing had deteriorated and that at the present time she was severely deaf which made driving her car a very tiring experience. She testified and introduced exhibits supporting her unsuccessful attempts to get van-pool transportation to Dover. Appellant observed that on several prior occasions she had been allowed to take annual leave when she came in late to work. She noted that her sleeping at work had only occurred when she had to drive a distance to get to the workplace. She stated that she had always wanted to deal with her hearing problem as something other than a disability because she did not want to be labeled as handicapped. The Appellant observed that at the time of her dismissal she was close to getting into the van-pool to ride to work and that if she did not have to drive the sleeping at work would not be a problem. The Appellant sought reinstatement with back pay; however, if that was not to be, she requested that she be provided with certain technical manuals she had been given in connection with her job.

LAW

MERIT RULE NO. 6.0600
Any absence from duty that is not in compliance with the rules governing authorized leaves shall be considered an absence without leave and is cause for disciplinary action.

No employee shall absent oneself from duty without authorization by the appointing authority, except in case of emergency illness, accident, or serious unforseen circumstances. Such emergency conditions should be brought to the attention of the appointing authority as soon as practicable.

An employee who is absent from the service without a valid leave of absence for three (3) consecutive working days, may be deemed to have abandoned his position and to have resigned from the service unless in the period of three working days succeeding such three (3) days the employee proves to the satisfaction of the appointing authority that such absence was excusable. If the employee's excuse does not satisfy the appointing authority, the employee may be considered to have resigned by abandonment of position. In the event of abandonment, the employee shall be notified in writing that such abandonment constitutes voluntary resignation.

Nothing contained herein shall be construed as preventing an appointing authority from taking disciplinary actions against an employee because of unauthorized absence.

MERIT RULE NO. 15.1
Employees shall be held accountable for their conduct. Measures up to and including dismissal shall be taken only for just cause. 'Just cause' means that the management has sufficient reasons for imposing accountability. Just cause requires:

- showing that the employee has committed the charged offense;
- offering specified due process rights specified in this chapter; and
- imposing a penalty appropriate to the circumstances.

MERIT RULE NO. 18.120
Absences without authorized leave or tardiness may, at the discretion of the appointing authority, subject the employee to disciplinary action in accordance with 15.0200.

FINDINGS OF FACT AND CONCLUSIONS

The Board finds that the Appellant was absent from work without authorization on

August 8, 2000. The Board further finds that the Department complied with the requirements of Merit Rule 15.1 in terminating the employment of the Appellant. The Appellant has the burden of convincing the Board by a preponderance of the evidence to rule in her favor. *Hopson v. McGinnes*, Del. Supr., 391 A.2d 187 (1978). The Appellant has not carried that burden.

Appellant does not dispute that she committed the conduct for which the discipline was imposed. Nor does she contend that her procedural rights afforded by the Merit Rules were abridged. Rather, Appellant's disagreement is with the severity of the sanction imposed and she seeks to have the Board overturn her dismissal. She does not claim that discipline was unwarranted for the events which occurred on August 8, 2000.

Termination of employment in the Classified Service of the State of Delaware is a severe sanction and to impose such a sanction on an employee for sleeping in her car for approximately 45 minutes beyond her 15 minute break would be severe indeed. However, the record of the progressive disciplinary actions presented in this case, and the extent of the absences coupled with the documented attempts to have the employee correct this pattern of behavior, is sufficient to compel the conclusion that the sanction imposed by the appointing authority has not been shown to be inappropriate. The evidence presented compels the conclusion that the Department has complied with Merit Rule 15.1 in all regards. There has been no violation of the Merit Rules and the Agency action in imposing the accountability must be upheld. As a purely humanitarian gesture, the Department is requested to do what it reasonably can in smoothing the transition for this employee from the Classified Service and, to provide her with any materials in the workplace to which she is entitled.

ORDER

For the forgoing reasons, by the unanimous vote of the undersigned members of the Merit Employee Relations Board, this grievance appeal is denied. The action of the Appointing Authority in terminating the Appellant's employment is upheld.

BY ORDER OF THE BOARD:

Dallas Green, Member

John W. Pitts, Member

John F. Schmutz, Esquire, Member

APPEAL RIGHTS

29 *Del. C.* § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: April 17, 2001

Distribution:
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Agency's Representative
Merit Employee Relations Board